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## State v. Pepper Respondent's Brief Dckt. 39145

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IN THE SUPREME COURT OF THE STATE OF IDAHO

**COPY**

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 39145
	)	
vs.	)	
	)	
FRANK R. PEPPER,	)	
	)	
Defendant-Appellant.	)	

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**BRIEF OF RESPONDENT**

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**APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL  
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE  
COUNTY OF TWIN FALLS**

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**HONORABLE JOHN K. BUTLER**  
District Judge

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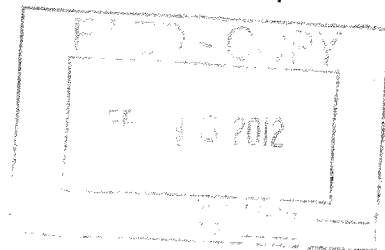
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## STATEMENT OF THE CASE

### Nature Of The Case

Frank R. Pepper appeals from the district court's appellate decision affirming the magistrate's finding that Pepper was guilty of harboring a vicious dog. Pepper claims the evidence was insufficient to support his conviction.

### Statement Of Facts And Course Of Proceedings

Bethany Cooke awoke on the morning of July 23, 2010, to the sound of dogs "yelping outside" her house. (Tr., p.5, Ls.1-11.) When Bethany went outside to find out what was happening, she saw four medium-sized black dogs in her yard. (Tr., p.5, Ls.12-13; p.5, L.20 – p.6, L.1.) Bethany thought one of the dogs might be hurt because it was lying down and the other three dogs were around him, so she went inside to get her shotgun to fire a warning shot to scare the dogs away. (Tr., p.5, Ls.13-16.) When Bethany returned from the house with the gun, the dogs started to chase her towards her house at which time she fired a shot and all four dogs ran away. (Tr., p.5, Ls.16-19.) Bethany watched the dogs run to Pepper's house, who lives approximately a quarter mile east of her. (Tr., p.6, Ls.4-13.) When Bethany returned to her yard, she discovered her three goats were dead. (Tr., p.7, Ls.5-11.) The goats appeared to have been killed by the dogs she ran off because their necks had "been eaten open" and "chewed on." (Tr., p.9, L.5 – p.10, L.9.) One of the goats also had a "chunk" eaten out of its "rear quarter." (Tr., p.10, Ls.11-12.) Bethany reported the incident to law enforcement. (Tr., p.7, L.24 – p.8, L.4.)

Deputy Matthew Radmall responded to the call. (Tr., p.8, Ls.6-7; p.17, Ls.5-18.) Deputy Radmall saw the goats and also concluded that it looked as though they had been killed by dogs. (Tr., p.18, Ls.1-11.) Deputy Radmall then went to Pepper's house. (Tr., p.18, Ls.22-23.) Consistent with what Bethany reported, when Deputy Radmall arrived at Pepper's house, "[s]everal" black dogs "came running around the home." (Tr., p.19, Ls.4-6, 9-10.) Deputy Radmall testified he felt threatened by the dogs because they were "aggressive, growling and barking." (Tr., p.19, Ls.11-15.) When Deputy Radmall told Pepper about the incident at Bethany's house, he claimed his dogs were not responsible, stating his dogs "never leave the property," even though the dogs acting aggressively toward Deputy Radmall were not chained or in a kennel. (Tr., p.20, Ls.5-17.) Pepper also denied his dogs were ever aggressive despite Deputy Radmall's observations to the contrary. (Tr., p.20, L.25 – p.21, L.4.) Deputy Radmall issued Pepper a citation and the state subsequently filed a complaint charging him with harboring a vicious dog in violation of Twin Falls County Code 5-6-4D.<sup>1</sup> (R., pp.5, 35-36.) Pepper pled not guilty and the case proceeded to a court trial. (R., pp.7, 45, 48.) At the conclusion of the court trial, the magistrate found Pepper guilty of harboring a vicious dog. (Tr., p.40, Ls.10-12.)

Pepper appealed his conviction to the district court claiming (1) the magistrate's finding that Pepper was not credible was clearly erroneous, and (2)

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<sup>1</sup> The relevant provisions of the Twin Falls County Code are attached hereto as Appendix A.

there was insufficient evidence to support his conviction. (R., p.78.) The district court affirmed Pepper's conviction and Pepper appealed. (R., pp.113-128.)

## ISSUES

Pepper states the issues on appeal as:

1. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE MAGISTRATE COURT'S JUDGMENT OF CONVICTION[.]
2. THE ORDER OF RESTITUTION PRECLUDES THE STATE FROM ARGUING ON APPEAL THAT CRIMINAL [sic] ACT IN THIS CASE WAS OTHER THAN AGAINST THE GOATS[.]

(Brief of Appellant on Appeal from Judgment of Conviction ("Appellant's Brief),

p.7 (capitalization original).)

The state rephrases the issue on appeal as:

Was there substantial competent evidence admitted at trial from which the magistrate found beyond a reasonable doubt that Pepper was guilty of harboring a vicious dog?



## ARGUMENT

### The District Court Correctly Concluded That The State Presented Substantial Competent Evidence From Which The Magistrate Found Pepper Guilty Of Harboring A Vicious Dog

#### A. Introduction

Pepper challenges his conviction for harboring a vicious dog, contending the magistrate court erred in denying his motion for judgment of acquittal because, he argues, there was insufficient evidence that his dogs were unprovoked and insufficient evidence that he harbored the dogs. (Appellant's Brief, pp.9-17.) Pepper's claim fails. A review of the record shows the state presented substantial competent evidence to prove beyond a reasonable doubt all of the elements of harboring a vicious dog. The district court correctly concluded as much in affirming Pepper's conviction. Pepper has failed to establish otherwise.

#### B. Standard Of Review

On review of a decision rendered by a district court in its intermediate appellate capacity, the reviewing court "directly review[s] the district court's decision." State v. DeWitt, 145 Idaho 709, 711, 184 P.3d 215, 217 (Ct. App. 2008) (citing Losser v. Bradstreet, 145 Idaho 670, 183 P.3d 758 (2008)). The appellate court "examine[s] the magistrate record to determine whether there is substantial and competent evidence to support the magistrate's findings of fact and whether the magistrate's conclusions of law follow from those findings." Id. "If those findings are so supported and the conclusions follow therefrom and if the district court affirmed the magistrate's decision, [the appellate court] affirm[s]"

the district court's decision as a matter of procedure." Id. (citing Losser, 145 Idaho 670, 183 P.3d 758; Nicholls v. Blaser, 102 Idaho 559, 633 P.2d 1137 (1981)).

An appellate court will not set aside a judgment of conviction entered upon a jury verdict if there is substantial evidence upon which a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Miller, 131 Idaho 288, 292, 955 P.2d 603, 607 (Ct. App. 1997); State v. Reyes, 121 Idaho 570, 826 P.2d 919 (Ct. App. 1992); State v. Hart, 112 Idaho 759, 761, 735 P.2d 1070, 1072 (Ct. App. 1987). In conducting this review the appellate court will not substitute its view for that of the jury as to the credibility of witnesses, the weight to be given to the testimony, or the reasonable inferences to be drawn from the evidence. Miller, 131 Idaho at 292, 955 P.2d at 607; State v. Knutson, 121 Idaho 101, 822 P.2d 998 (Ct. App. 1991); Hart, 112 Idaho at 761, 735 P.2d at 1072. Moreover, the facts, and inferences to be drawn from those facts, are construed in favor of upholding the jury's verdict. Miller, 131 Idaho at 292, 955 P.2d at 607; Hart, 112 Idaho at 761, 735 P.2d at 1072.

C. The State Presented Sufficient Evidence To Prove All The Elements Of Harboring A Vicious Dog

Following a court trial, the magistrate found Pepper "guilty of harboring a vicious dog[]" (Tr., p.40, Ls.11-12), and the district court affirmed (R., pp.113-124). Pepper claims on appeal that the state failed to present sufficient evidence of two elements: (1) that his dogs were unprovoked, and (2) that he harbored the dogs. (Appellant's Brief, pp.9-17.) The record demonstrates otherwise.

Twin Falls County Ordinance 5-6-4D provides, in relevant part: "Vicious Dogs: It shall be unlawful for any person to own, harbor, or have in his/her possession any dog or dogs which, when unprovoked act in a manner consistent with the definition of vicious dog as defined in Section 5-6-1 of this Chapter."

Section 5-6-1 defines vicious dog as:

Any dog, which when unprovoked, has bitten, clawed, or otherwise harmed or constitutes a physical threat to persons or other animals, or a dog whose temperament or habits endanger or menace any person or other animal. This term shall not include a dog that bites, attacks, or menaces a person or other animal that has tormented or injured the dog.

The state presented substantial competent evidence that Pepper's dogs harmed, *i.e.*, killed Bethany's goats without provocation. (See generally Tr.) Pepper's claim that the state failed to prove lack of provocation is based on the following assertion:

. . . [Bethany] testified that she awoke to the yelping, not barking, of dogs. Because the dogs were all yelping, and not barking, [Bethany] thought that at least one dog was injured. [Bethany] was unable to determine the extent of any injuries prior to the dogs leaving and did not testify when the injury occurred. [Bethany] testified that the goats were on their own leashes and all within thirty feet of one another. There was no testimony about the length of the leashes or the overlap of circles the leashes allowed the goats to roam. Additionally, she was also unable to provide any testimony that the dogs attacked the goats unprovoked.

(Appellant's Brief, p.13.)

Pepper's argument misrepresents the evidence. Bethany did not testify that "[b]ecause the dogs were all yelping, and not barking, [she] thought at least one dog was injured." (Appellant's Brief, p.13.) While she initially thought one dog was injured, that was based on the fact that one of them was lying on the

ground with the other three around it; it was not based on the “yelping.” (Tr., p.5, Ls.12-16; p.14, Ls.12-15.) In fact, she explained the “yelping” was not the sound of an injured dog, but was “yelping in a mad manner.” (Tr., p.14, Ls.10-15.) Pepper’s claim that Bethany “was also unable to provide any testimony that the dogs attacked the goats unprovoked” is also without merit. (Appellant’s Brief, p.13.) As Pepper acknowledges, Bethany testified that her goats were chained. (Tr., p.7, Ls.19-21; p.12, L.23 – p.13, L.2.) Pepper lives one-quarter mile away from her and it was his dogs that came on her property, not her goats that went on his property. (Tr., p.5, L.12 – p.6, L.13.) The mere fact that Pepper’s dogs found Bethany’s goats appealing does not constitute provocation.

Moreover, Bethany testified that while her goats would understandably try to protect themselves if they were being attacked by dogs, they had never displayed any “vicious tendencies.” (Tr., p.13, Ls.3-5; p.14, Ls.16-19.) Indeed, in addition to serving as “weed control,” the goats were her kids’ pets. (Tr., p.7, Ls.22-23; p.8, Ls.2-3.) While it is true that Bethany did not actually see Pepper’s dogs attack her goats, such was not required in order to establish they did so. As noted by the district court, circumstantial evidence that the dogs attacked the goats was sufficient and, as the magistrate found, that evidence was strong. (R., p.120; Tr., p.10-20.) State v. Streeper, 113 Idaho 662, 665, 747 P.2d 71, 74 (1987) (“[A] defendant may be convicted solely on circumstantial evidence.”); State v. Stefani, 142 Idaho 698, 704, 132 P.3d 455, 461 (Ct. App. 2005) (“Evidence that is entirely circumstantial may suffice to support a verdict, and substantial evidence does not mean that the evidence need be uncontradicted.”);

State v. Simmons, 120 Idaho 672, 679, 818 P.2d 787, 794 (Ct. App. 1991) (“A conviction may be based on circumstantial evidence, and the conclusion of guilt may be based on proof of the circumstances and the probable deductions from those circumstances.”).<sup>3</sup> Even if the goats acted in a manner to protect themselves once Pepper’s dogs came after them, this would only establish the goats were provoked, not the dogs. The very case upon which Pepper relies actually supports this proposition.

Pepper cites Boots ex rel. Boots v. Winters, 145 Idaho 389, 179 P.3d 352 (Ct. App. 2008), for the proposition that “only minimal amount of conduct can equal provocation, thereby cutting off liability.” In Boots, two young boys were taunting a dog in a neighbor’s backyard by kicking the fence and swinging a jacket over the fence at the dog. 145 Idaho at 391, 179 P.3d at 354. The dog responded by pulling the jacket away from the boy into the backyard. Id. When one of the boys went to retrieve the jacket, the dog attacked him. Id. The boy’s family filed a civil suit based on injuries the boy suffered, as well as injuries suffered by his mother when she went to his aid. Id. In disposing of the lawsuit, the Court of Appeals considered whether the landlord who rented the property was liable under I.C. § 25-2805(2), which defines a vicious dog as: “Any dog

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<sup>3</sup> With respect to Pepper’s reference to the lack of “testimony about the length of the leashes or the overlap of circles the leashes allowed the goats to roam,” he fails to explain why he finds this significant. (Appellant’s Brief, p.13.) To the extent he is implying that the length of the leashes may have allowed the goats to leave Bethany’s property, she specifically testified to the contrary. (Tr., p.13, Ls.1-2.) If Pepper is suggesting that the overlap may have allowed the goats to “gang up” on Pepper’s dogs when they came on Bethany’s property, this not only fails to establish provocation, the evidence indicates that the goats did not do so because Bethany did not find all the goats together. (Tr., p.7, Ls.5-11.)

which, when not physically provoked, physically attacks, wounds, bites or otherwise injures any person who is not trespassing.” The Court concluded, in part, that the landlord was not liable because the child “provoked the brown dog’s attack by kicking the fence and swinging his jacket at the dog.” Id. at 395, 179 P.3d at 358. Thus, even if Boots is instructive, it actually supports the conclusion that any action taken by the goats in an effort to defend themselves against the attack by Pepper’s dog would only absolve Bethany of liability, not Pepper.

In addition to challenging the sufficiency of the evidence relating to whether his dogs were unprovoked, Pepper also argues there was insufficient evidence that he harbored the dogs. (Appellant’s Brief, pp.14-17.) More specifically, Pepper asserts the “mere presence on [his] property does not create liability.” (Appellant’s Brief, p.15 (capitalization altered, italics omitted).) The district court rejected Pepper’s sufficiency claim on this element, first noting that “[t]o ‘harbor’ means to provide lodging, shelter, or refuge.” (R., p.120 (citing BLACK’S LAW DICTIONARY 733 (8<sup>th</sup> ed. 2004)).) The district court then reasoned:

[T]here is substantial and competent evidence to convince a reasonable trier of fact that the defendant harbored the dogs. The defendant provided shelter to 15-20 dogs. Dogs that match the description of the dogs present on [Bethany’s] property. [Bethany] testified to having seen four dogs on her property that looked like the defendant’s dogs and not like the other neighbors’ dogs. [Bethany] saw the dogs leave her property, travel a quarter of a mile to the defendant’s property. As stated above, to harbor means to provide lodging or shelter or refuge. The defendant said he was not even sure how many dogs he owned, but estimated the number of dogs to be 15-20. At the very least, these dogs were provided with refuge by the defendant.

(R., pp.122-123 (footnote omitted).)

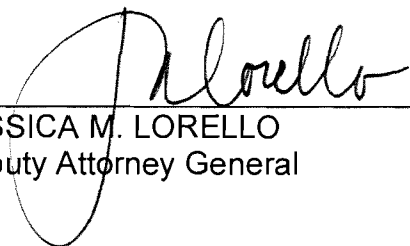
As noted by the district court, there was substantial competent evidence to support the magistrate's finding that, at a minimum, Pepper harbored the dogs that killed Bethany's goats. While the evidence may have been circumstantial given the lack of "DNA evidence, hair follicles, or paw prints to prove the identity of the dogs" (R., p.122), circumstantial evidence is enough to support a conviction. Streeper, 113 Idaho at 665, 747 P.2d at 74.

The state presented sufficient evidence to support Pepper's conviction for harboring a vicious dog. The district court correctly concluded as much and Pepper has failed to establish otherwise.

#### CONCLUSION

The state respectfully requests that this Court affirm the judgment entered upon Pepper's conviction for harboring a vicious dog.

DATED this 13<sup>th</sup> day of February, 2012.

  
\_\_\_\_\_  
JESSICA M. LORELLO  
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 13<sup>th</sup> day of February 2012, I caused two true and correct copies of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

TREVOR MISSELDINE  
Deputy Public Defender  
P.O. Box 126  
Twin Falls, Idaho 83303-0126



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JESSICA M. LORELLO  
Deputy Attorney General



# APPENDIX A

**5-6-1: DEFINITIONS:**

For the purpose of this Chapter the following terms shall have the meaning set forth in this Section unless the context otherwise indicates:

**AT LARGE:** Any dog off or away from the premises of the owner, and not under the control of such owner or his agent by confinement within a vehicle, or otherwise restrained and under the immediate control of a competent and responsible person.

**DOG:** Any male, female, spayed female or neutered male dog of any age including wolves, coyotes, or any animal of the dog family domesticated, wild or crossed.

**IMPOUNDED:** Having been received into the custody of the Twin Falls County Sheriff's Department or into the custody of the People for Pets Humane Society or other designated agent of the Twin Falls County Sheriff's Department.

**NUISANCE DOG:** A dog which molests passersby or passing vehicles, trespasses on property not owned by the dog's owner, is repeatedly at large, damages public or private property, or barks, whines, or howls, in an excessive, continuous or untimely fashion.

**OWNER:** Any person, persons, firm, association or corporation owning, keeping or harboring a dog or dogs.

**POUND:** Any animal shelter, lot, premises, or building for the confinement and care of dogs seized under the provisions of this Chapter.

**VICIOUS DOG:** Any dog, which when unprovoked, has bitten, clawed, or otherwise harmed or constitutes a physical threat to persons or other animals, or a dog whose temperament or habits endanger or menace any person or other animal. This term shall not include a dog that bites, attacks, or menaces a person or other animal that has tormented or injured the dog. (Ord. 133, 6-26-1995)

**5-6-4: RESTRICTED, PROHIBITED ACTS AND CONDITIONS:**

A. Running At Large: It shall be unlawful for any person to own, harbor, or have in his/her control a dog, whether the dog is licensed or not, which dog is found at large upon the streets or alleys or the County, or in any public place in the County or upon any other premises without the consent of the person in possession of such premises. Said person who owns, harbors or has in his/her control said dog is responsible for such dog being at large in violation of this Chapter except:

1. When such dog is in the presence of a person and controlled by a leash, not to exceed ten feet (10') in length; or

2. When such dog is confined to a motor vehicle; or
3. When such dog is in the immediate care and control of a competent and responsible person.

**B. Rabies Suspect:**

1. It shall be unlawful for a person to own, harbor, or keep any dog afflicted with rabies.
2. The Twin Falls County Sheriff's office or the People for Pets Humane Society, shall secure, for destruction, any dog afflicted with rabies.
3. It is hereby made the duty of an owner of a dog showing symptoms of rabies, or of an unvaccinated dog which has bitten any person causing an abrasion of the skin to surrender the dog for confinement at the People for Pets Humane Society, or a licensed veterinarian, for a minimum of ten (10) days. If such a dog shall be determined to be free of rabies, the same shall be returned to the owner upon payment of the regular fee for keeping dogs impounded. If such fee is not paid, the dog shall be subject to disposal as provided by disposition of unclaimed dogs in this Chapter. At the discretion of either the Sheriff, the People for Pets Humane Society, or the South Central District Health Department, if the owner of the subject dog submits a certificate of current rabies vaccination the quarantine of the dog may be upon the premises of the owner, or the person in charge of such dog, if the dog is securely confined and is kept from contact with other animals.

**C. Nuisance Dog:** It shall be unlawful for any person to own, harbor, or have in his/her possession any dog or dogs which acts in a manner consistent with the definition of a nuisance dog as defined in Section 5-6-1 of this Chapter. Such dog shall be deemed a nuisance and shall be prohibited and may be subject to impound pursuant to this Chapter.

**D. Vicious Dogs:** It shall be unlawful for any person to own, harbor, or have in his/her possession any dog or dogs which, when unprovoked act in a manner consistent with the definition of a vicious dog as defined in Section 5-6-1 of this Chapter. Such dog or dogs shall be prohibited and may be subject to impound and destruction pursuant to this Chapter. (Ord. 133, 6-26-1995)

**5-6-8: VIOLATION; PENALTY:**

A. Violation; Summons: In addition to or in lieu of impounding a dog and/or destruction of a dog found in violation of this chapter, the sheriff or deputy sheriff may issue to the known owner of such animal a summons in magistrate court in the fifth judicial district in the state of Idaho and county of Twin Falls, and upon conviction the owner shall be subject to any penalties as provided by this chapter.

B. Penalties:

1. Any person violating subsection 5-6-4A, "Running At Large"; B, "Rabies Suspect"; or C, "Nuisance Dog", of this chapter shall be guilty of an infraction, punishable by a fine not to exceed one hundred dollars (\$100.00).
2. Any person violating subsection 5-6-4D, "Vicious Dogs", of this chapter, and in addition to any liability as provided in Idaho Code section 25-2806, shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not exceeding more than three hundred dollars (\$300.00) or by imprisonment not exceeding more than thirty (30) days or by both said fine and imprisonment. For a second or subsequent violation of this provision, the court may, in the interest of public safety, order the owner to have the vicious dog destroyed or may direct the appropriate authorities to destroy the dog. (Ord. 175, 12-20-2004)

